
IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

BROADWAY TOWEL SUPPLY
COMPANY, a corporation, and
Amos Burg,

Appellants,

vs.

BROWN-MEYER COMPANY, a
corporation,

Appellee.

Appeal from the District Court of the United States
for the District of Oregon.

APPELLANTS' BRIEF.

T. J. GEISLER,
of Counsel for Appellants.

JOSEPH L. ATKINS,
of Counsel for Appellee.

*In the District Court of the United States for the
District of Oregon.*

Broadway Towel Supply Company, a corporation,
and Amos Burg,

Appellants.

vs.

Brown-Meyer Company, a Corporation,

Appellee,

No. 2971.

APPELLANTS' BRIEF

This was a suit by the above named appellee, as plaintiff, against the above named appellants, as defendants, to recover for the infringement of a patent.

This appeal presents two main questions—the first arising on the interlocutory decree adjudging that the device complained of infringes the patent in suit; and the second arising on accounting before the Master, after the interlocutory decree, viz.:

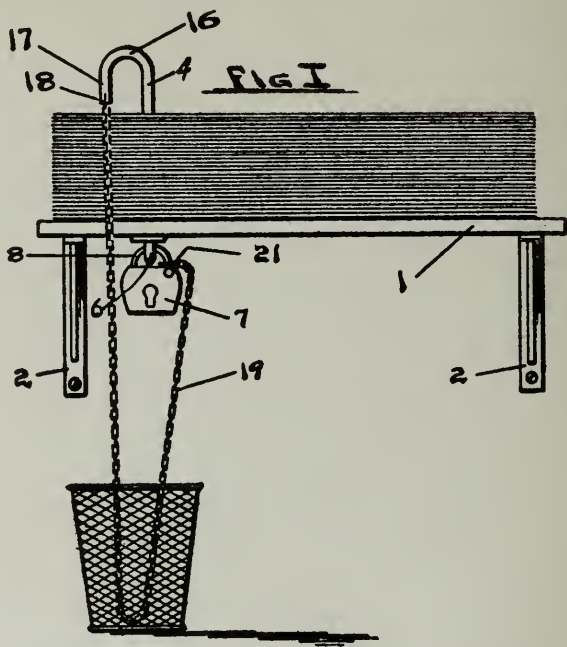
First: Is infringement to be judged upon the *actual arrangement and use* of the device in question, or upon how it *might* be arranged and used?

Second: Is the patentee of a mere *improvement* of an *old* combination obliged to establish the benefits attributable to his improvement, and *restricted* to such in his recovery?

The patent in suit is that granted to C. F. Brown November 3, 1914, No. 1,115,895, for a Towel Holder, on an application filed August 13, 1913; and he had assigned his entire interest to the Brown-Meyer Company, the appellee.

A copy of this patent is to be seen in the "Appendix of Documentary Evidence" in the Transcript of Record following page 123.

The following "Fig. 1" from the Brown patent drawing shows the whole idea.



The parts of this device Brown termed as follows: 1, a supporting *shelf*; 2, *brackets* thereof; 4, the *assembling member*, or post, rotatably supported on the shelf 1 and made with a crooked head as at 16. The towels in use are strung on the towel-stringing chain or "*flexible retaining member*" 19, which is secured at its upper end, 18, to the crooked top-end of the assembling member 4, and is provided at its lower end with an *eyelet* 21 by which it is fixed on the *shackle* 8 of the *padlock* 7.

The questions propounded require no extensive examination of the record of this cause.



THE DOMINANT FACTS

may be briefly stated as follows:

Both appellants and appellee conduct laundries in the city of Portland, and are particularly engaged in furnishing towels for use in the lavatories of public buildings, and other places.

For sanitary reasons the idea had been conceived of supplying individual towels in public places. In the city of Portland such was required by an ordinance.

Experience showed that if the individual towels were supplied loose, a considerable number would be lost. Hence inventors sought to provide a towel-rack which would allow a fairly convenient use of the towels, but at the same time tie them in place.

As far as the record shows, the subject had received the attention of inventors since 1896.

Brown adopted bodily a prior patented device (as will presently be shown) to which he added a functional improvement.

The appellee used its device publicly for some time prior to the issuance of said Brown's patent, and being a fairly convenient device, appellant company adopted it, not knowing that it was being patented.

The device which appellants were using on November 3, 1914, is shown by the cut opposite this page.

As well known, Patent Office proceedings are confidential; and of course appellants could not be charged with notice of the Brown patent until its issue Novem-

ber 3, 1914, and the further time required by mail for bringing actual notice to Portland, Oregon.

In fact the first actual notice which appellants had of said patent was a letter received from appellee's attorney in the early part of November, 1914. (Trans. 87, 92.)

Immediately after receiving such letter, Burg, of appellants, called on inventor Brown about the matter, and was referred to the latter's attorney. There were further interviews between Burg and Brown, and his attorney (Trans. 88), but these lead to nothing.

Then appellants consulted an attorney who procured the record, i. e., the "File Wrapper" of the Brown patent. When the File Wrapper had been examined appellants were advised by their counsel that the device they were then using infringed the Brown patent, but such infringement could be avoided by changing the arrangement of the towel-stringing chain; and thereupon appellant's device was re-arranged as shown in the following cut:

Note that the lower end of the towel-stringing chain (19) of the Brown device is attached to the lower end of the towel-assembling post (4), while in appellant's rack, *after its change*, above illustrated, the lower end of the chain was permitted to hang down into, and fastened to the bottom of a basket.

Appellants were advised by their counsel that the file wrapper showed a device prior to Brown, invented by one Reid, which they might follow by making the



change stated, and thus avoid infringement of the Brown patent.

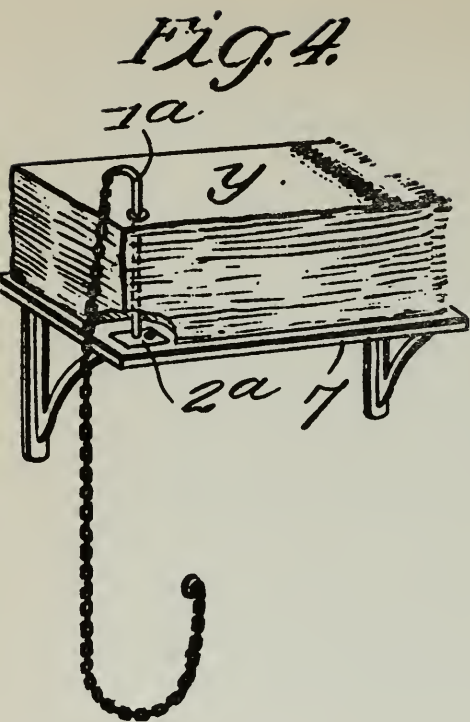
The File Wrapper of Brown's patent disclosed the following facts:

When Brown filed his application, a number of patents had already been issued for towel racks, directed to the same general purpose Brown had in mind; and these patents were cited by the Examiner of the Patent Office in the prosecution of Brown's application. All such patents are contained in said "Appendix of Documentary Evidence," but it is only necessary to deal with a few of them.

The most important—really the progenitor of all the essentials of the Brown device—is the patent of *Guy Reid* issued July 15, 1913, No. 1,067,622, entitled "Combined Towel Holder and Rack."

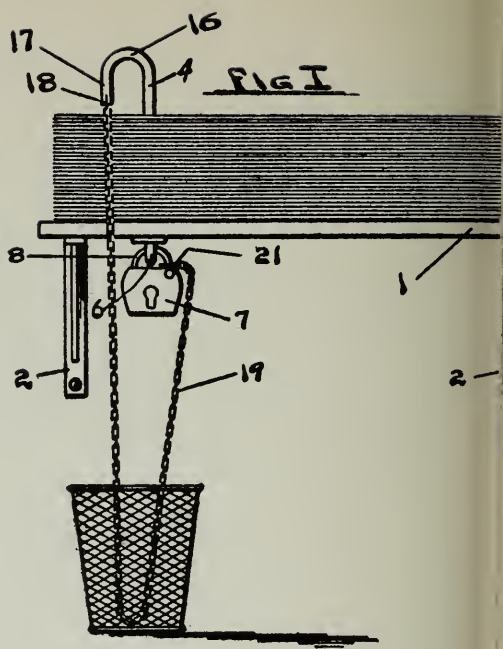
It is to be noted that the application for said Reid patent was filed about a year before the Brown application; and Brown in his amendatory letter of Feb. 19, 1914, to the Patent Office (See *File Wrapper*, Trans. p. 109) *admitted that the application on his own improvement was drawn in view of the disclosure of this Reid patent.*

A clear idea of the bearing of the Reid device on the Brown device is readily obtained by placing Fig. 4 of the drawing in the former patent side by side with Fig. 1 of the drawing in the later Brown patent, as here done.



The earlier Reid Device as shown in his patent drawing, Fig. 4.

7 is a shelf on which is mounted a rod 1^a secured to the shelf by a locking device 2^a. y represents the number of towels placed on the rod or towel assembling post 1^a.



The later Brown Device as shown in his patent drawing, Fig. I.

1 is the supporting shelf, 2, the brackets therefor, 4 the assembling member or post, 16 the crooked head of the latter to the dependant end 17 of which the upper end 18 of the chain 19 is attached, the lower end of the chain being provided with an eyelet 21 for fastening on the shackle 8 of the padlock 7.

A parallel statement of excerpts from the printed specifications of these two patents, as here given, will also aid their understanding.

The REID PATENT,
dated July 15, 1913.

* *

"As well known, the surreptitious abstraction of towels in hotels involves a considerable financial loss to the proprietors, and I have devised an improved means for holding and securing towels in toilets and other rooms in such manner as to prevent their removal without interfering with their convenient use. To these ends I provide the towels with metal eyelets and string them on a bar or rod which is supported in, and locked to a fixed support, and to whose outer end a chain is attached, the other end of the latter being secured to a wall staple or ring. The towels are normally held on the bar or

The BROWN PATENT,
dated Nov. 3, 1914.

* *

"My invention relates to towel holders, and has for its object the production of a device for holding and preserving in order an assemblage of clean towels. * *

A further object of the invention is to provide means for conveniently withdrawing the towels one by one from the pile, for facilitating the manipulation of it while in use, and for securing it against accidental displacement or intentional or unauthorized removal after use." (Printed specification Brown patent, lines 9 to 24, page 1.) * * *

"The rigidity of the assembling member (4), which is preferably made a feature thereof, serves to

rod, but may be slid off and down on the pendant chain so as to be conveniently used. The soiled towel hanging on the loose portion of the chain.” (Page 1, lines 8 to 25 of Reid printed specification.) * * *

“When a towel is required for use it is pulled off the bar or rod 1a and drawn down on the chain, * * * and then, after using, it is allowed to fall and descend by gravity * *” (Ib lines 65 to 69, page 1.)

secure the clean towels in place upon the shelf, while the flexibility of the retaining member, constituting as it does in fact a continuous extension of the assembling member, provides for the widest latitude of manipulation of individual towels in use.” (Ib, lines 90 to 98, p. 2.)

The claims in the Brown patent read:

1. In a towel holder or the like, the combination with a supporting member, of an assembling member adapted to secure towels in assemblage upon the supporting member, a flexible retaining member co-operative therewith for the purpose specified, *and means for securing both ends* of said retaining member to the assembling member.

2. In a towel holder or the like, the combination with a supporting member, of an assembling member adapted to secure towels in assemblage upon the supporting member, a flexible retaining member co-operative therewith for the purpose specified, *and means for*

detachably securing both ends of said retaining member together.

3. In a towel holder or the like, the combination with a supporting member provided with a bore, of an assembling member rotatably fixed in said bore, a retaining member flexibly secured at one end of the assembling member, and *means for detachably securing the free end of the retaining member* to the socket end of the assembling member.

4. In a towel holder or the like, the combination with a supporting member provided with a bore, of an assembling member rotatably fixed in said bore, a retaining member flexibly secured at one end to the assembling member, and *means for detachably securing the free end of the retaining member* to the socket end of the assembling member, said means being adapted also to secure the assembling member in its socket.

An examination of the history of this patent, as furnished by the File Wrapper, will show that the novelty in these combinations alone resides in the particular functional arrangement of the towel stringing chain, set forth in such claims, for:

The crooked towel-assembling member—by which a horizontally stacked batch of towels may be lifted up, clear of the supporting shelf—was previously shown in the design patent to J. Rouso, No. 42398, granted April 9, 1912; also in the patent to L. Straub, No. 1,038,984, granted Sept. 17, 1914. The latter also shows the crooked towel-assembling member as *rotatably* supported on a shelf.

And the combination of a shelf, a crooked towel-assembling member or post, and a chain-like or "flexible towel-retaining member" is shown in said patent to G. Reid, No. 1,067,622, granted July 15, 1913. The latter really is the prototype of all the essentials of the Brown device, and differs only therefrom in that it does not have the same functional arrangement of its chain, 5, as the chain, 19, of the Brown device.

When Brown filed his application he made the following *additional claims*, (see File Wrapper, Trans. p. 105) which were *rejected and cancelled*:

1. In a towel holder or the like, the combination with a movable supporting member, of a flexible towel retaining member secured in its entirety thereto.

2. In a towel holder or the like, the combination of a movable supporting member, of a flexible towel-retaining member, and means for detachably securing the latter in its entirety to the former.

5. In a towel holder or the like, the combination with a supporting member, of an assembling member swiveled to the supporting member, and a retaining member co-operative with said assembling member.

6. In a towel holder or the like, the combination with a supporting member, of an assembling member swiveled to the supporting member, and a retaining member carried by said assembling member co-operatively with said supporting member.

7. In a towel holder or the like, the combination with a supporting member provided with a socket, of an

assembling member mounted in said socket, and a retaining member detachably secured to the assembling member.

8. In a towel holder or the like, the combination with a supporting member provided with a socket, of an assembling member mounted therein, a retaining member carried by the assembling member, and common means for securing the retaining member to the assembling member and the assembling member to the supporting member.

11. In a towel holder or the like, the combination with a supporting member, of a towel assembling member provided with a threading point, and means for operatively uniting said members, substantially for the purpose specified.

An analysis of the claims in the Brown patent brings out the fact that each of the combinations set forth in its broadest aspect consists of these elements:

1. A shelf.
2. A post-like "towel assembling member" supported (rotatably or otherwise) by the shelf.
3. A chain or flexible towel-retaining member—this chain being secured at its top end to the towel assembling post.
4. Means (specifically a padlock) for detachably securing the lower end of the chain to the lower end of said post.

In the play of language used in claim 1 of the Brown patent, the padlock is defined as:

“means for securing both ends of said retaining member (chain) to the assembling member (post).”

And in claim 2, as:

“means for detachably securing both ends of said retaining member together.”

These latter designations of the Brown chain, with respect to its particular arrangement, is somewhat obscure, but is aided by the explanation contained in Brown's amendatory letter of Feby. 19, 1914, in which he states to the Examiner (Trans. 110) “Let it be noted that in applicant's construction his assembling member (the post) constitutes an elongated link of special function in the retaining member (the chain).

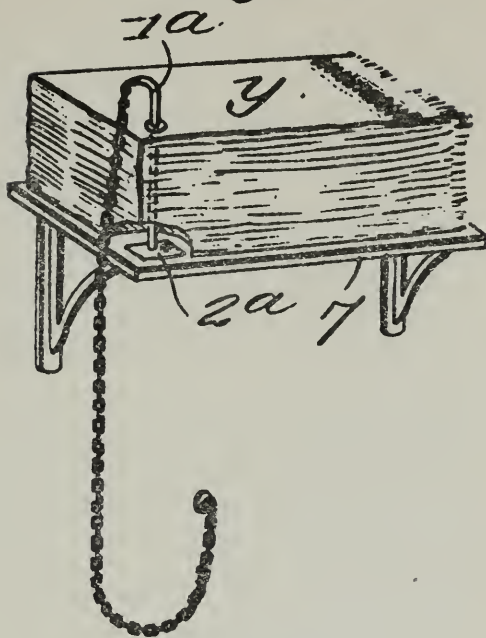
But we need not bother with this refinement of language and just get down to “brass tacks” as it were.

Here again, for convenience, are given comparative views of the devices patented to Reid and Brown.

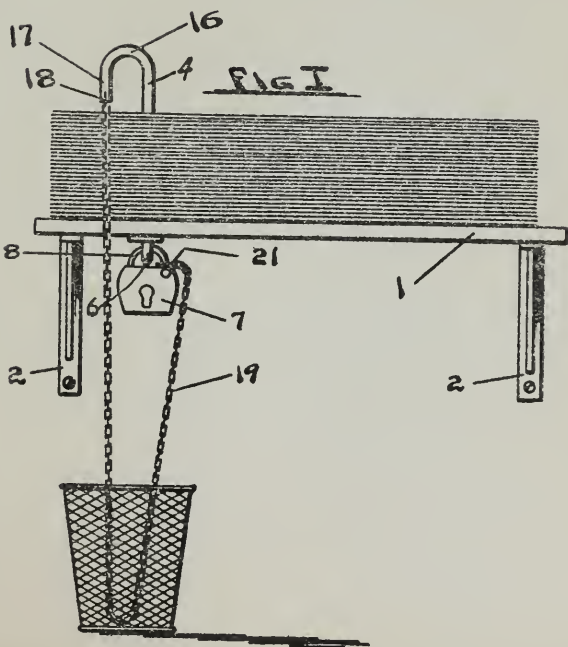
And applying the simple process of subtraction of the former from the latter, we see that the substance of the Brown invention is the rearrangement of the towel-stringing chain of the prior Reid patent, so that the lower end thereof is attached to the lower end of the towel-assembling post, directly under the shelf, instead of to a point below the shelf, as in the Reid device.

It is to be noted that Brown tried to secure, but it was denied him, claims not including said particular feature for see said rejected and cancelled claims 5 to 8 and 11 above referred to.

Fig. 4.



REID DEVICE



BROWN DEVICE

It is further to be noted that in each of the four claims of the Brown patent, *the flexible member—the chain—has a particular FUNCTION ascribed to it.* Thus in claim 1 the particular arrangement of this chain is stated to be “for the purpose specified,” i. e. in the specification, in which we are told (see printed copy of Brown’s patent, p. 2, lines 96 to 98) that it “provides for the widest latitude of manipulation of the individual towels as illustrated in Fig. II of Brown’s patent. In his amendatory letter of July 23, 1914, (Trans. 116) Brown further amplifies this function of the particular arrangement of his chain as follows:

“The combination described in claim 3 (being claim 1 of the patent) defines a special construction and a distinct utility. It is this, in the Reid device, as shown partly in Figure 2, each individual towel must be used in close proximity to the other towels, clean and soiled, upon the holder. Of course, it may be said that this situation may be relieved by increase of length of chain. But this does not meet the situation. To increase the length of chain beyond certain limits is impracticable, would tend to defeat the purpose of the device, in the kinking of the chain, for example. Applicant has devised means for obtaining the maximum availability of each individual towel in use without impairment of the certainty of operation of the device.”

From the foregoing analytic examination of Brown’s patent, it is obvious that the margin of patentability of his alleged improvement over the prior Reid device was exceedingly small.

But appellants did not concern themselves with that question. True, they did not want to be deprived of their rights, yet they decided to avoid infringement of whatever patent appellee had. They promptly changed their device, as mentioned, and offered to settle on any reasonable basis for the month's prior infringement (Trans. 33, 36).

Referring again to the arrangement and operation of appellant's device, after changed as above illustrated, it is to be noted that this device did not then embody the crucial and dominant element of the Brown patent, for *it did not embody a chain—or flexible retaining member as Brown terms it—having both ends secured to the towel assembling post.* And appellants contended that they no longer infringed. But appellee disputed appellants' contention; appellee claiming that appellants' device, notwithstanding said changes, still infringed, because it still embodied "*means by which this device MIGHT be rearranged and then used like the Brown device.*"

This suit then followed. The evidence taken therein developed the facts above stated.

It was conceded on the trial, also on the accounting before the Master ('Trans. 30, 82), that appellants' device, after its said change, was used only with the lower end of the towel-stringing chain hanging down and fastened to the bottom of the basket, and that the lower end of the chain was not fastened to the lower end of the assembling member, or post.

The District Court in finding in the affirmative on the question of infringement, reached conclusions clearly erroneous, it is submitted, as shown by the following excerpts from its opinion: (Trans. 45-6-7)

"The claims of the complainant's patent, it must be conceded, are subject to narrow construction. * * *"

"The defendants are using a device in practically all respects, as to construction and operation, the same as plaintiff's, except that they attach the lower end of the retaining member or chain to the bottom of a basket inside, and not to the lower end of the assembling member, as does the plaintiff's contrivance."

"* * * I am not persuaded that the simple means of attaching the chain or retaining member to the bottom of the basket on the inside instead of at the foot of the assembling member, varies the device to such an extent as *to add a new discovery*, or even an old element, to the combination. The complainant's device is so constructed that the basket may be used in connection with it as a depository for the soiled towels. The defendants' device simply makes the basket a depository and merely changes the place of attachment for the lower end of the chain or retaining member. As an illustration, in the Reid patent, the lower end of the chain is attached to a wall, and yet the patent to complainant's assignor was granted notwithstanding the prior patent of Reid. *Now suppose that the defendant had used the Reid patent and simply detached the chain from the wall and attached it to the bottom of the basket and used the basket as a depository for the towels, could any one say*

that such change constituted an added discovery or new element to the Reid patent? The Reid retaining member could have been used by elongating the chain so as to drop the sag into a basket and thereby bring the basket into play as a depository as the complainant uses a basket."

"Thus I cannot conceive that the detachment from the lower end of the assembling member in the Brown patent and attaching it to the bottom of the basket or depository is the adding of a new element or discovery to the defendants' device, and am impressed that the alleged new device is merely colorable and without potent variation such as will avoid infringement."

Manifestly the defense of appellants was erroneously conceived by the lower court, and it is not controlled by any such rule of law as suggested by the opinion.

The defense of infringement in the Answer was stated as follows: (Trans. p. 9, 10, 11)

"That the alleged invention of said Charles F. Brown related to towel holders designed for supplying individual towels to users, and that this was a well and highly developed art before said Brown entered into the field, with his said alleged improvement, as is shown by the following patents: (here are stated the patents cited by the Patent Office against Brown's application as originally presented.)

"That, therefore, the alleged improvement of said Brown, if it did constitute an invention, was of a very specific and limited character, and must be construed

accordingly in order not to encroach upon the rights which were vested in the general public prior to, and at the time said Brown entered said field."

"That the defendants admit that they made and used a few towel holders embodying the features set forth in said claims of said alleged letters patent, but such making occurred some time before said letters patent were issued, and before the defendants had any knowledge of said Brown's alleged invention, or that said letters patent were to be issued therefor; and immediately after the defendants were informed of said letters patent, they notified the plaintiff that they would discontinue the use of towel holders embodying features covered by said letters patent; and did thereupon proceed immediately to change over their said towel holders so that same would, and did, not infringe upon said letters patent."

The change so referred to was the arranging of the towel stringing chain in the same manner as shown in said patent to Reid, which was prior to Brown's invention, and which appellants had as much right to use as appellee.

After the entry of the interlocutory decree and during the accounting before the Master, appellants sought to introduce into their defense, by supplemental answer, two additional patents, of which they had no knowledge when they filed their original answer, but both very material, in this, one of such patents apparently dominates the Brown patent, and therefore appellants' apparent liability under such dominating patent should be taken

into consideration on accounting; and the other patent bears directly on the patentable novelty of the Brown invention, in view of the construction which appellants insisted on placing on and the court's construction of the Brown claims.

As to these matters it is sufficient to refer to the record: Trans. 51, 60.

The court denied appellants leave to file such supplemental answer, and on accounting the Master refused to permit any proof of said alleged dominating patent.

On accounting the Master found: (Master's Report Trans. 64)

I.

"The particular towel rack covered and protected by the letters patent was not manufactured and sold by either complainant or defendant, and therefore there is no account of profits made by defendants or lost by complainant.

II.

"Complainant has not established any license fee for the use by others of the patented article, and the proof does not show the value of such a license.

III.

"The evidence shows in actual practice the towel rack in question was a device to permit the ordinary use of individual towels and at the same time protect the laundry from losses by theft."

He further found: (Trans. p. 66)

“The Broadway Towel Supply Company furnished under the circumstances already detailed the number of towels stated, viz., 446,858, and the total receipts therefor was \$1,340.50. Of this amount the proof shows 25 per cent, or one-quarter, was profit, or \$335.00.”

The Master in his report also says: (Trans. 63)

“Defendants (appellants) * * * insist that the Master should determine * * what proportion of the towel rack is covered and protected by the letters patent. *The Master* believes and *holds* * * * *the plaintiff (appellee) is entitled to recover its damages without any attempt by the master to segregate or apportion the amount of such damages resulting from the use of any particular portion or element of the towel rack protected by the letters patent.*”

“And as a conclusion of law (Trans. p. 67) that the complainant is entitled to recover of defendants Broadway Towel Supply Co. and Amos Burg the sum of \$335.00, together with costs and disbursements.”

Due exceptions were taken to the master's report (see Trans. 86-90) to the effect:

I (b) That under the facts of the case and findings of the master, the only benefit which appellants received from the towel rack used by them was a saving in the loss of towels. That the only testimony as to the probable loss, *if no rack were used*, fixed such loss at approximately 50% (Trans. 87). That the 446,858 towels used by appellants in its service represented an investment of \$385.00, and a 50% loss of such sum would only be

\$192.50. Therefore the award of the master on this basis is erroneous.

I (c) That the award of \$335.00 by the master is greatly in excess of any saving by defendants (appellants) due to the patented features of the towel rack used by them, for such towel rack represented in its greatest part merely the towel rack patented to said Guy Reid, above referred to, which is prior to the patent in suit, and in which appellee had no greater interest or right than these appellants, or the general public. "That though the claims of the complainant's patent are founded upon a combination that does not change the character of the invention, if in fact it is a mere improvement in some particular of the prior Reid towel rack. Nevertheless, the master refused to examine into the character of the complainant's patent, or to ascertain what portion of the towel rack used by this defendant said patent covered, and protected, and what portions it did not protect. (Master's report, pp. 63, 64) And further refused to segregate and apportion the alleged savings of defendants, due to the use of said towel rack relatively to the features of the latter, protected by said patent. All of which proceedings of the Master were contrary to law and equity."

I (d) The master's finding is further erroneous and inequitable because the complainant's patent apparently is itself dominated by another patent, as appellant sought to prove by proper and sufficient evidence, also their obligation thereunder; but appellee objected to such proof, and the master erroneously sustained such

objection. (Trans. of Test. before master, pp. 82-84) In consequence these appellants, contrary to the principles of equity, may be subjected to a double liability for the using of the same thing, instead of compensating each patentee only and portionately to his interest in such thing.

Appellants further excepted to the finding and award by the master of any other than nominal damages to the appellee, for the reason that the evidence does not show in what sum, if any, the appellee sustained any actual damages in the premises.

All these exceptions were overruled by the District Court (Trans. 91).

Thus arose *the two questions first above stated*, and here, for convenience, restated so as to bring out the contentions of the parties:

FIRST: The appellee affirms that the appellants' device, after its specified change, still infringed, because it embodied "*means which MIGHT be used to imitate the Brown patent, although it was conceded that it was NOT SO USED, nor so intended.*"

The appellants, on the negative, contend that they were not to be adjudged guilty merely because their device comes within the *letter* of the Brown patent.

SECOND: The appellee further affirms that Brown *though a mere improver of a pre-existing device*—the latter *capable of beneficial use* without his improvement, and in fact *the only use complained of was SUCH use*—by combining his new feature with the pre-

existing device *reinvented*, and may *reclaim*, the whole thing *in its ENTIRETY and may recover on the thing as a whole*; while appellants, on the negative, contend that Brown is restricted in recovery to the *specific features* of his invention; and such features are *to be segregated by him* as a basis for any recovery other than nominal.

On the above stated proceedings are based appellants'

ASSIGNMENTS OF ERROR

which for convenience will be divided into: Those relating to the interlocutory decree; Those relating to the subsequent accounting and final decree.

Those relating to the interlocutory decree specify as follows:

I.

In finding that the towel rack used by defendants from and after Dec. 1, 1914, to date of trial of this cause was not substantially different from the device claimed in the patent in suit, and that defendants' said device is an infringement of the device claimed in the patent in suit.

II.

In giving to the claims of the patent in suit a broader interpretation than warranted on the face thereof, or permitted by the prior state of the art.

III.

In finding that the device used by the defendants from December 1, 1914, is an infringement of the inven-

tion claimed in the patent in suit, because such finding is contrary to the principle and spirit of the patented invention in question, and also contrary to the law governing patents for combinations.

IV.

In finding that the device used by defendants from December 1, 1914, although merely an obvious modification of the patented invention of Reid, of record, which is prior to the patent in suit, nevertheless is an infringement of the patent in suit, for such finding disregards the rights vested in the general public prior to the issuance of the patent in suit.

V.

In finding that in order for the Court to hold that the device used by defendants from December 1, 1914, is not an infringement of the device claimed in the patent in suit, because substantially like the prior Reid patent of record, it must appear that the said defendants' device has added to it a new element or discovery, and without such defendants' device is merely colorable, and without such patentable variation as will avoid infringement.

VI.

In finding that there was substantial identity between the device claimed, and secured, by the patent in suit and the device used by defendants from Dec. 1, 1914, with respect: (first) to the result attained, (second) the means of attaining that result, and (third) the manner in which the different parts operate and cooper-

ate to produce that result; and in not finding that there was a substantial difference in said two devices in these respects.

VII.

In the entry of the interlocutory decree in this cause, because in prejudice of the substantial rights and equities of the defendants in the premises.

VIII.

In denying the petition of defendants for relief to file, under equity rule 34, a supplemental answer alleging material facts of which they were ignorant at the time of their original answer, towit: setting forth patents of the United States granted for inventions prior to that of the patentee in suit, and bearing directly on the invention claimed in the latter patent with respect to the validity and scope thereof, and also bearing on the obligation of defendants under the patents of said prior inventors, which obligations defendants desired to be taken into account on their accounting herein.

Those relating to the subsequent accounting and final decree, specify errors as follows:

XI.

In overruling the defendants' exception I to the report of the Master on account.

XII.

In overruling the defendants' exception III to the report of the Master on accounting.

XIII.

In affirming the report of the Master, awarding the sum of \$335.00 against the defendants because such award is excessive, not supported by, and contrary to, the facts of the case.

XIV.

In awarding any other than a nominal sum against defendants, because the evidence does not show what, if any, actual damages the plaintiff sustained by any alleged infringement.

XV.

In the entry of the final decree in this cause because in prejudice of the substantial rights and equities of the defendants in the premises.

POINTS AND AUTHORITIES.

The questions will be discussed in the following order:

I. The questions arising on the interlocutory decree, finding infringement of appellants' device with respect to its arrangement, and conceded only use, after Dec. 1, 1914.

II. The questions arising on the accounting and the final decree.

I.

The interlocutory decree was wrong. It wrongfully punished appellants and deprived them of their substantial rights.

The Brown patent covers only a particular *functional* rearrangement of the prior Reid device. In each of the Brown claims this function is included and governs the particular co-operative arrangement of the towel-assembling post and the towel-stringing chain. This feature it was, Brown stated to the Examiner of the Patent Office, (see file wrapper, Trans. 109) “which in practice corrects the deficiencies of the subject matter of the several references”—among which the Reid patent was the most pertinent.

By this functional arrangement, Brown argued (Trans. 110) he obtained such distinctive advantages over the Reid device as to deserve a patent; and it was this feature alone which persuaded the Examiner to allow the Brown application for patent. Hence, *all claims of the latter were restricted to such particular feature, as above pointed out.*

Therefore under the law of patents, *THE FUNCTION of the elements, in the Brown patent claims, is the basis of their co-operative relationship.*

A patent is a contract between the public and the inventor (2 Rob. on Patents, 70, Sec. 481) and should be construed like any two-sided instrument, so as to get the intent of the grantor (the public) as well as of the grantee (the inventor). American Roll Gold Leaf Co. vs. Coe Mfg. Co., 212 Fed. 720, 724, CCA 1st Cir., citing McClain v. Ortmyer, 141 U. S. 419, 424.

On the law governing combination patents, it is said in 1 Rob. on Patents, 385:

“In determining the identity of the combination the investigator meets and is required to answer the four following questions: I, what are its constituent elements; II, what are the essential qualities of each; III, what is the nature of its co-operative law; IV, what are the new intrinsic attributes resulting from the combination of the old.”

At page 388, Sec. 282, it is stated: “The identity of the combination requires identity of elements, of co-operative law, and of essential attributes.” (Page 389) “When *all* the elements are the same, identity depends upon *identity of co-operative law*.” (Page 395) “That unless the co-operative law of two combinations are the same, the combinations are distinct, notwithstanding the identity of their elements.” Citing a list of earlier cases, among them *Pattee v. Moline Plow Co.*, 9 Fed. 821, 834, holding that the “defendant *had the right to combine the same parts as plaintiff had so long as he did not use the same combination*.”

In 3 Rob. on Patents, sec. 292, page 95, it is stated: “The infringement of a combination patent therefore consists in the use or sale of any combination in which precisely the same elements, or their equivalents, are united under the same co-operative law. To make or use or sell a combination in which the same elements are definitely combined * * * is not an infringement.”

In *Rich v. Baldwin*, 133 Fed. 920, 923, the court said: “In order to establish the infringement of a mere improvement of a machine, of former devices already in use for accomplishing the same result, the means must

be substantially the same, operate the same way, and accomplish the same result."

In *Kenny Mfg. Co. v. J. L. Mott Iron Wks.*, 137 Fed. 431, 434, the court held that *Where it is shown that the field of invention was exceedingly narrow when the patentee entered it, his claim, in order to be upheld at all, must be limited to the feature shown and described.*

In *American Can Co. v. Hichmartt Asp. Canning Co.*, 137 Fed. 86, 90 (Cal. 1905), Judge Morrow remarked: "To sustain a claim of infringement of a patented machine, three things must be found, first identity of result, second, identity of means, and third, identity of operation."

In *Lieberman's Exe'rs v. Rueell*, 165 Fed. 208, 210, the Court said: "Where an improvement is narrow in its character, the inventor is ordinarily confined to his specific device, and receives little aid from the doctrine of equivalents. If he depends upon a single limited feature (as in the case here) the doctrine will not ordinarily be applied so as to cover a device in which that feature does not appear."

In *Electric Protection Co. v. American Bank Protection Co.*, 184 Fed. 916, 923, CCA 8th Cir., the court says: "To sustain the charge of infringement the infringing device must be substantially identical with the one alleged to be infringed in (1) the result attained, (2) the means of attaining that result, and (3) the manner in which the different parts *operate and co-operate* to produce that result. If the devices are substantially

different in either of these respects a charge of infringement is not sustained.”

In *Kokoma Fence Mach. Co. v. Kinselmans*, 189 U. S. 8, 24, Chief Justice Fuller remarked: “We * * * agree with the (Circuit Ct.) in the conclusion that the machine lacks that identity of means and identity of operation which must be combined with the identity of result in constituting infringement.”

In the case at bar, the District Judge said, in his opinion, (Trans. 45) “*The claims of complainant’s patent, it must be conceded, are subject to narrow construction.*” “And during the trial, the court remarked (Trans. p. 25) “This is a very narrow issue, you (appellants) claim that you are using more nearly the Reid device than you are the Brown device.”

In combinations, the purpose thereof must be borne in mind, and “*even if the combination exists, yet, if it is not so arranged as to effect the (purpose) there is no infringement.*” That was the rule announced by Judge Blatchford in *Rennick v. Pond*, 20 Fed. cases, 537, 540.

In *Lovell v. Johnson*, 91 Fed. 160, the CCA, 1st cir., in construing the claim of a patent concerning an improvement of the breech loading gun, said: (162) “We think the claim valid when limited to the functions of the two slots.” And then distinguished a somewhat similar construction in defendants’ device by saying: (163) “The so-called slots on either side of the hammer in defendant’s breech piece is a mere passageway.” In other words, it *lacked the function* of similar slots of the patent.

In *Whitaker Cement Co. v. Huntington*, 95 Fed. 471 the C. C. A. 3rd Cir., in construing a patent having a claim which embodies the phrase "means for suspending said shafts from above so that said rollers may rotate against the die by centrifugal force," said. "The solution of this question depends upon the scope which should be accorded * * with special reference to (said phrase)"; and, finding dissimilarity of functional purpose in the device held by the lower court to infringe, reversed the latter's decree and directed the bill to be dismissed.

In *Anthony Co. v. Gennert*, 108 Fed. 396, 398, the CCA, 3rd Cir., said, in construing a claim having a functional limitation: "*To ignore the express functional limitation of the claim * * * would be to create a new claim; not to interpret the one granted.*"

In *Masseth v. Larkin*, 111 Fed. 409, 411, Judge Buffington followed the latter rule with approval and applied it to a claim having the functional limitation: "arms adapted to engage with the sides of the hole."

In *Thompson Meter Co. v. National Meter Co.*, 106 Fed. 519, 530, the court, relying on the principal of the foregoing cases, which it cited, held it to be *a matter of law, well settled*, "*that a specific statement or function inserted into a claim cannot be disregarded,*" and only covers the use of such combination when it performs the function stated in the claim.

In *Gill v. Wells*, 89 U. S. 1, 14, the court said: "Valid letters patent may be granted for * * * a new combination of old ingredients, but the rule is equal-

ly well settled in such a case that the invention consists merely in the new combination of ingredients, and that a suit for *infringement cannot be maintained against a party who constructs or uses a substantially different combination, even though it includes the exact same ingredients.*"

In *Avery & Sons v. J. I. Case Plow Works*, 139 Fed. 878, 886, it was held, in construing a combination relating to a plow and embodying the phrase "brace rods rigidly attached to the mold board" that these terms "amount to a limitation which the (patentee) cannot escape for the purpose of making out infringement."

It may be said that the padlock of appellants' device introduced the bone of contention. It corresponds with *the letter* of the Brown patent claims, for it represents means usable for fastening the lower end of the towel-stringing chain to the bottom end of the towel-assembling post. But *the function* of the padlock in the Brown patent is one thing, and that in appellants' device another.

Appellants, after Dec. 1, 1914, when they changed their device, intended, and *exclusively used*, their padlock only for *securing the towel-assembling post* against unauthorized removal. Reid also used a lock for that purpose. Having used one kind of lock, can Reid not use another? There is nothing original in the use by Brown of a padlock for his purpose. He merely adopted it because readily had in the market, and cheap. He merely used it, as already stated, as a means for a *functional* purpose; and *only in that sense is it a legitimate*

element in the *Brown claims*. The function is indispensable, inseparable, without breaking the combination under the rules of law above referred to.

Appellants' device does not have, nor is it intended to have, *its chain arranged as in the Brown patent*. The functional element of the *Brown claims* is neither obtained nor desired in appellants' device, note *the only mode of use* of the latter as *conceded on the record* (Trans. 30, 82). Therefore, it is not an infringement. To hold otherwise is to disregard all fundamental patent law, and *to condemn on the letter*, in disregard of the spirit of the patent in suit. It would change the *Brown patent* from a certificate of reward for his invention to an instrument for embarrassing legitimate competitors, by wrongfully fining and restraining them in the same field of enterprise. Such is a perversion of the purposes of patents.

What MIGHT be done with appellants' towel rack is not the question.

Reid *might* have arranged his chain like that of *Brown*. Indeed, by merely moving the lower end of his towel-stringing chain close to the bottom of the shelf, and there fastening it on the wall, he obtained substantially the same result, with respect to convenient use of towels, as *Brown* does.

That which infringes if later, will anticipate if earlier. (Knapp v. Moss, 150 U. S. 221, 228; Miller v. Eagle, 151 U. S. 186, 203.)

That an invention which would not anticipate will not infringe, see *Cook v. Sandusky Tool Co.* (4 Sup.

Ct. Rep. 4; 28 L. Ed. 124; 26 O. G. 1114), where it is stated "If the hoe made * * * infringes the patent of the appellant, it was an anticipation of the invention. * * * If it is not an anticipation, it is not an infringement."

"That a device which, if existent before the making of patented invention, would not anticipate it, cannot, if made after the issue of the patent, be said to infringe it." See *Cleveland v. Chicago*, 135 Fed. 783.

Therefore, *only that which would anticipate, if earlier, will infringe if later*. In other words, *there is BUT ONE STANDARD to apply to the question as to the bearing of WHAT MIGHT BE DONE with one device as compared with another*.

The rule of law which governs this question has been frequently applied on alleged anticipations.

The U. S. Supreme Court decided, in *Topliff v. Topliff*, 145 U. S. 156, 161, "It is not sufficient to constitute an anticipation that the device relied upon *might*, by modification, be made to accomplish the same *function* performed by the patent in question, *if it were not designed* by the maker, nor adapted *nor actually used* for the performance of such function."

In *Dederick v. Cassell*, 9 Fed. 309, the court said: "It will not answer to say the combination required no invention, that any mechanic might have selected the parts and combined them. The same might be said with equal force in almost every instance in which a patent for combination is issued."

This is the rule also recognized by the Court of Appeals of this Circuit, in *Los Alamitos Sugar Co. v. Carroll*, 173 Fed. 280, 284, the court said: "A device which does not operate on the same principle cannot be an anticipation." (page 285) "It is not sufficient to constitute anticipation that a device relied upon what might, by a process of modification, reorganization or combination with each other, be made to accomplish the function performed by the device of the patent sued on."

Since what MIGHT have been done would not bar the granting of a patent, neither will what might be done by the alleged infringer with his device, BUT WHICH HE DID NOT DO, constitute him an infringer.

Counsel for appellee, in the Patent Office, in order to obtain favorable action there asserted the rule (file wrapper, Trans. 115) "*It is scarcely necessary to argue that grounds of rejection of a claim and a defense against infringement are in all respects identical.*"

On a legal construction of a claim, founded on a function in the improved patent, any device which does not possess such function does not infringe, no matter to what extent, in other particulars, it may be similar. *Eppler v. Campbell*, 86 Fed. 141.

"*Though a device may be forced to operate like the plaintiffs, yet it is not an infringement if such use was not the object of its construction.*" *Buzzell v. Andrews*, 25 Fed. 822, cited with approval by Judge Hazel in *Winslow v. Bronson*, 106 Fed. 178, 183.

The attempt of appellee to make the defendants' device infringe—viewed in the face of the conceded only

use and arrangement of appellants' towel-rack, after its change Dec. 1, 1914, and to the end of the period accounted for, may be summed up by a remark often applied to contracts and their construction: "*It may be within the letter but not within the spirit of the contract.*"

Mr. Justice Brown, in *Westinghouse v. Boyden Powder Brake Co.*, 170 U. S. 537, 568, said: "The patentee may bring the defendant within the letter of his claims, but if the latter's device is not in fact identical with the principle of the invention claimed to have been infringed, he is as little subject to be adjudged an infringer as one who violates the letter of the statutes has to be convicted, where he has done nothing in conflict with the spirit or intent."

In *Standard Computing Scale Co. vs. Computing Scale Co.*, 126 Fed. 639, 649, the CCA, 6th Cir., applied the rule of the foregoing case, in reversing the lower court.

In *Edison v. American Mutoscope & Biograph Co.*, 151 Fed. 767, 773, the CCA, 2nd Cir., said: "Infringement should not be determined by a mere decision that the *terms* of a valid patent are applicable to the defendant's device. Two things are not precisely similar because the same words are applicable to each."

In *General Elec. Co. v. Allis Chalmers Co.*, 178 Fed. 273, 276, the CCA, 3rd Cir., said: "The mere fact that a device may be within the letter of the claim of a patent is not conclusive proof of infringement."

When a device, designed merely for an improvement of a well advanced art, is described as having particular features of construction, which are adapted to accomplish specific results or modes of operation, and the claim of the patent is for that device, the features so described are covered by the claim, and may not be rejected, or treated as of secondary importance, in order to extend the patent over other forms or features not described.

Temple Pump Co. vs. Goss Pump Co., 58 Fed. 196, 204, cited with approval in Standard Elev. Co. v. Crane Elev. Co., 76 Fed. 761, 767.

II.

The second question, as mentioned, arose on *the accounting before the Master*, and may be divided into three branches:

That is, the appellants contend:

(A) Under the evidence, the probable loss of towels, likely to result where not tied in place by a towel-rack, is to be estimated at 50% (Trans. 77). That \$385.00 represents the total value of the towels in use by appellants on the towel racks in question (Trans. 74). Assuming the latter to have saved the 50%, such would represent merely \$192.00. There was no evidence whatsoever furnishing a basis to the Master for awarding \$335.00.

(B) Whatever the saving against loss resulting from the use by appellants of the towel-racks in ques-

tion, such towel-racks represented in their major part merely the Reid invention, which Brown himself borrowed in his subsequent improvement; therefore, appellee was *not entitled to recover the whole* of said savings of appellants, but only such part, if any, as directly attributable to the Brown improvement. The burden of this was on the appellee. Failing to carry this burden he could only recover nominal damages.

(C) That appellants ought to be permitted to prove, by extraneous evidence, obligations due from them to other patents, if any, also embodied in the device in question, so that their obligations to other inventors may be taken into consideration on their accounting, and they be saved from paying twice for the same thing.

These questions will now be discussed in the order stated.

(A)

Assuming the infringement to be as found by the court what injury did the appellee sustain?

I.

Patent cases form no exception to the general rule that the patentee is to be compensated only for the property taken from him.

“The rule of damages is fixed and uniform as much so as in any ordinary action on the case * * * It establishes the same measure * * * as that which courts of law adopt * * * in all other torts.”

1 Robinson on Patents, Sec. 1051.

In order to determine the nature of the patentee's injury it is first to be ascertained what use he himself made of his device. For that determines whether any property right to which the patentee himself put his device, has been interfered with. Or whether complainant, in divulging the idea involved in the patentee's patent, performed a service to the general public, instructing them how to obtain a new benefit, for which service the user must compensate the patentee according to the reasonable value of such service.

In I Robinson on Patents, Sec. 1054, it is stated:

"The evil consequences resulting to the plaintiff from the violation of his patent depend upon the *method* in which he receives the benefit of his monopoly * * * the owner of a patent who neither derives nor purposes to derive any advantage from his rights under the patent cannot sustain injury from any appropriation of the invention on the part of others. * * *"

Section 1160, page 336:

"Direct evidence shows the extent to which the actual enjoyment of the invention by the plaintiff has been diminished by the wrongful acts of the defendant." (as found by the Master, there was no such evidence) "Indirect evidence discloses the benefits derived by the defendant from the infringement, and thence infers the extent of plaintiff's loss."

The latter evidence is the only kind offered in the case at bar.

The Master found: (Trans. 64) "*The particular towel rack covered and protected by the letters patent was not manufactured or sold by either complainant or defendant, and therefore there is no account of the profits made by defendant, or loss by complainant. Complainant has not established any license fee for the use by others of the patented article, and the proof does not show the value of such a license.*"

The finding of the Master disposes of the first phase of the question, and leaves only this phase: If the appellant laundry company has availed itself of the patentee's services without the latter's permission, what is the reasonable value of such service? The answer submitted by appellants to such question is: *The value of such service is the benefit derived therefrom; bearing in mind, however, the benefit must be derived from the services performed by the inventor, that is, the new idea transmitted, and the product of such service, as distinguished from the old device already in possession of the public.*

As already stated, the towel racks used by appellants from November 1, 1914, to December 1, 1914, are admitted to be like the Brown device; but those used from December 1, 1914, throughout the remainder of the period were, both in the arrangement and use of the towel-stringing chain, like the prior Reid device. See stipulation of parties, before Master, to that effect (Trans. 82).

The testimony before the Master showed that appellants, during the period accounted for, November

3, 1914, to February 28, 1916, laundered, 446,858 towels which they supplied to their customers on the towel-racks in question.

The total receipts of appellants from their said towel service were \$1340.50, which represented a gross profit of 25%, amounting to \$335.00, and *the Master awarded appellee the whole of such sum* (Master's report Trans. 66).

This award of the Master on accounting, it is submitted, was wrong, because not supported by the evidence; and the District Court erred in not sustaining appellants' exception thereto.

The appellee was entitled to recover only such profits of appellant laundry as were attributable to the use of the Brown improvement over the Reid device, if any, and these profits had to be established by the appellee.

There were no benefits attributable to the use of any towel-rack, except protection against loss of towels, by being carried away.

The proof as to the probable extent of such loss was very loose. Although there must have been some data based on experience, *the testimony offered* on this point by appellee *was a mere guess*. All the evidence offered was by Meyers, of appellee corporation, who testified (Trans. 77):

"We adopted a rack for holding the individual towels assembled instead of using loose individual towels, to keep them from being stolen. Without some means of securing them against theft *I think the public would*

have stolen fifty per cent. of them, or more. That would have been practically prohibitive of the business."

The question is, *during what period of time* would this loss have occurred? That was part of appellee's case. Assuming that the appellants would have lost one-half of their towels but for the use of a towel rack, the evidence shows (Trans. 74) that they used 7700 towels in their service of a total value of \$385.00; hence the loss of one-half of such sum would only be \$192.00; and that is all appellants saved, and all the appellee is entitled to recover.

The appellants excepted to said finding and report of the Master (see Exceptions I(a) (b) Trans. 86); and also assigned error to the District Court in overruling such exceptions.

But suppose it were assumed that the loss of appellants without said towel racks would have been so great that *all* their profits on towels would have been wiped out, *the protection from loss was not due to the functional re-arrangement of the prior Reid device by the Brown invention.*

In other words, Brown's improvement had for its purpose merely the rendering of the use of towels *more convenient. It did not add a particle to their security against theft. That idea Brown himself borrowed from Reid.* He so told the Patent Office (see Brown file wrapper, Trans. p. 109), where it is stated that *the Brown "application was drawn in view of the (Reid device)," the alleged deficiency of which Brown claimed to correct.*

Therefore, *it was incumbent on appellee to establish approximately the proportionate value of the Brown improvement over the Reid device; and he could recover such only.*

There was no apparent difficulty in making such segregation. The appellee simply refused to make such apportionment, and in this was sustained by the error of the Master. (Trans. 63.)

The error of the Master was clearly pointed out by the appellants to the District Court in their exceptions I (c) and III. Trans. 88 and 90.

(B)

The position taken by the appellee in the lower court, and adopted by the Master and the District Court, was that since the claims in the Brown patent state a combination apparently covering an entirety, therefore, the infringer of those claims must pay over all profits by a device covered by said claims.

The true rule is—appellants submit—that insofar as the savings from loss by the use of the towel-rack in question was attributable to the improvement of the Brown patent, they belong to the appellee, and insofar they were due to other parts or features of said towel-rack, they belong to the appellants.

This rule has long since been firmly established in the premises, as shown by the following line of authorities, culminating in our U. S. Supreme Court, by which the whole question is lucidly summed up in the case of Dowagiac Mfg. Co. vs. Minn. Moline Plow Co., 235 U. S. 641.

This case came up on certiorari from the C. C. A. 8th Cir. (183 Fed. 314). In order to bring out the points involved in this decision more clearly, appellants attach, as an appendix to this brief, a copy of the patent construed, viz.: The patent to W. F. Hoyt, on Grain Drill, granted February 10, 1891, No. 446,230.

The Court of Appeals, in deciding the controversy based on this patent, said: "While its claims call for all the elements of a then well known grain drill, namely, transporting wheels, frame, hopper, shoe, draft rods, clamping plates, etc., the spring metal pressure rod used in combination with those elements constitutes the invention. It rests in the improvement of a well known structure."

"Its character and scope have been thus briefly referred to, because they are important in determining the true measure of recovery for infringement. *The general rule in patent cases, like all others, is that a complainant is entitled to recover damages for the loss he has sustained by reason of the wrongful acts of the infringer, and the burden is on him to show how much it is.*" This was laid down by Mr. Justice Field * * * in *Garretson v. Clark*, 111 U. S. 120. He said:

"When a patent is for an improvement and not for an entirely new machine or contrivance, the patentee must show in what particular his improvement has added to the usefulness of the machine or contrivance. He must separate its results distinctly from those of the other parts, so that the benefit from it may be distinctly seen and appreciated * * * *the patentee must in*

every case give evidence tending to separate or apportion the defendant's profits and the patentee's damages between the patented features and the unpatented features, and such evidence must be reliable and tangible and not conjectural or speculative. Complainant offered proof tending to show the profits made by the defendants in sales of the entire structure, without making any apportionment of them to the patented features, as distinguishing from the balance of the drill. It claimed the doctrine of apportionment to have no application, first, because, although the patent contained but one novel element, the combination of that element with the others constituted an appropriation of all of them in combination. In other words, the contention is that because the Hoyt patent is a combination patent, in which one novel feature is combined with several not novel, each and all of the elements associated in that combination are for the purpose of an accounting to be considered as appropriated by the patentee, and if there is an infringement of the novel feature all the profits made by the infringer upon the whole combined structure are recoverable, and that proof of those made by reason of the novel feature alone is unnecessary." The cases cited in support of such contention, the Court continued, "have recently been considered by us in an opinion written by Van Devanter, Circuit Judge in the case of *Brown v. Lanyon Zinc Co.*, 179 Fed. 309, where a conclusion was reached adverse to the complainant's present contention. * * * We think that an apportionment of the profits between the patented and unpatented parts of the drill was indis-

pensably necessary. *The invention did not inhere in the entire machine as an entirety, but was only an improvement in a single element of an otherwise well known device.*"

It may be here remarked that this construction of our patent law is inevitable when the purpose of patents, as provided for in our Federal Constitution, is considered. Our constitution states that it is intended "to promote the progress of science and useful arts by securing, for limited times, to * * * inventors the exclusive rights to *their* respective * * * discoveries." Therefore, a patent is a reward for genius and industry, but *the reward given the inventor cannot be greater than the services rendered by him.*

When the Hoyt Drill case was reconsidered on certiorari by the Supreme Court, the same Judge who wrote the opinion in *Brown v. Lanyon Zinc Co.*, just referred to, having become a member of the Supreme bench, also wrote the opinion of the latter court. The Supreme Court, though it reversed the lower court because of there existing in the case "special reasons why a final disposition of the case should not be made on the present record," nevertheless affirmed the doctrine of the lower court, and but for such special reasons would have affirmed its decree (235 U. S. 641, 650).

The Supreme Court said: "Upon the evidence submitted, the masters reported that the recovery should be limited to nominal damages, which reports were confirmed by the Circuit Court. Its action was affirmed by the Circuit Court of Appeals." (183 Fed. 314.)

“The conclusion that the recovery should be thus restricted was rested upon these grounds: first, that the patent was not for a new and operative drill, but only for designated improvements in a type of drill then in use and well known; second, that the value of drills embodying this invention, as marketable machines, was not wholly attributable to the designated improvements, but was due in a material degree to other essential parts which were not patented; third, that the plaintiff failed to carry the burden, rightly resting upon it, of submitting evidence whereby the profits from the sale of the infringing drills could be apportioned between the patented improvements and the unpatented parts; and, fourth, that, although the number of sales made by the defendants was disclosed, the evidence did not present other data essential to an assessment of the damage sustained by the plaintiff by reason of the defendants’ infringement.

“It is quite plain, as we think, that the patent was not for a new and operative grain drill, but only for particular improvements in a type of grain drill then in use and well known. The invention was so described in the specification forming part of the patent. The inventor there said:

“This invention relates to new and useful improvements in grain drills commonly known as “shoe drills;” and it consists in a certain construction and arrangement of parts, as hereinafter more fully set forth, the essential features of which being pointed out particularly in the claims.

‘The object of the invention is to provide an independent spring-pressure for each of the shoes and covering wheels of the drill, whereby the work of the drill is rendered efficient in uneven ground, and to provide means whereby said shoes and covering wheels may be raised from the ground when the implement is not in use or when transporting it from one field to another.’

“In keeping with this statement the claims in the patent were limited to a suitable construction and arrangement of spring-pressure rods in combination with certain correlated elements of the seeding part of a grain drill—the part which opens the furrows, guides the seed into them and then closes them. Of course, this was an important part; but it was only that; for other parts were required to complete the make and make it operative. Some of these were simple and easily supplied, such as the tongue and attachments to which the horses were hitched. Others were complex and required careful adjustment. This was especially true of the feeding mechanism whereby the grain was fed from the feed box or reservoir into the several hoppers in the continuous, uniform and precisely measured streams, so that it might be deposited in the furrows evenly and in suitable quantity. Only when all the parts were present and so adjusted as to perform their respective functions was the drill a practical and successful machine. In this respect no change resulted from the invention covered by the patent. It affected material improvements in one part, but did not obviate or diminish the necessity for the others.”

“We think the evidence, although showing that the invention was meritorious and materially contributed to the value of the infringing drills as marketable machines, made it clear that their value was not entirely attributable to the invention, but was due in a substantial degree to the unpatented parts or features. The Masters and the courts below so found and we should hesitate to disturb their concurring conclusions upon this question of fact, even had the evidence been less clear than it was.”

“In so far as the profits from the infringing sales were attributable to the patented improvements they belonged to the plaintiff, and in so far as they were due to other parts or features they belonged to the defendants. But as the drills were sold in completed and operative form the profits resulting from the several parts were necessarily commingled. It was essential, therefore, that they be separated or apportioned between what was covered by the patent and what was covered by it, for, as was said in Westinghouse Co. v. Wagner Co., 225 U. S. 604.

‘In such case, if plaintiff’s patent only created a part of the profits, he is only entitled to recover that part of the net gains.’

*“In the nature of things the profits pertaining to the patented improvements had to be ascertained before they could be recovered by the plaintiff and therefore it was required to take the initiative in presenting evidence looking to an apportionment. * * **

"The burden of apportionment was then logically with the plaintiff, since it was only entitled to recover such part of the commingled profits as was attributable to the use of its invention."

"But the plaintiff did not conform to this rule. It neither submitted evidence calculated to effect an apportionment, nor attempted to show that one was impossible. * * * *It is inconsistent with the ordinary principles and practices of courts of chancery, either, on the one hand to permit the wrong-doer to profit by his own wrong, or, on the other hand, to make no allowance for the cost and expense of conducting his business, or to punish him by obliging him to pay more than a fair compensation to the person wronged.*"

In *Dun Mfg. Co. v. Standard Co.*, 204 Fed. 617, 618, 619, the C. C. A. 6th Cir., in reversing the lower court, said:

"In support of the master's report it is also urged upon us that the article, patented and completed and manufactured by defendant, was an entirety; that the five elements of the claims, recited as constituting a combination, make up the entire market value, and hence that *all* the profits on that structure flow from the infringement and that there is no occasion for any apportionment of profits by either party."

"This argument assumes that the rule of necessity for apportioning profits, and all the difficulties arising thereunder, pertain only to a case where a patented combination is a part of, or an attachment to, a more extensive structure, and, that, where the defendant's

sale is of a structure comprising only the combination of the patent, the defendant must, ipso facto, account for all the profits received on the sale. This view is plausible, as a matter of original reasoning, and finds support in statements made by several courts, and in some things said by this court; but we do not think it has ever been intended to establish this proposition as a general rule. (Authorities.)”

In *Herman v. Youngstown Car Mfg. Co.*, 216 Fed. 604, 606, 607 (C. C. A. 6th Cir., 1914):

“The patent had reference to a device or structure for making blueprints by artificial light. It consisted of a glass cylinder around the outside of which were exposed the sensitive paper and the negative backed by an opaque curtain, facing inwardly, and on the inside of which an electric arc lamp was caused to be lighted for a suitable period. The cylinder was vertical and the electric light suspended from above, was passed slowly and steadily down through the axial line of the cylinder. Of course, a suitable supporting frame was necessary to keep the cylinder and light and their various appurtenances in proper mutual relation. It is apparent, from our previous opinion, that the invention as to which patentability and infringement were found had reference only to the means provided for causing and regulating the desired downward motion of the lamp. This is illustrated by Claim 12, which reads:

“12. In a printing apparatus the combination of a printing cylinder suitably mounted, an electric lamp,

electric connections with said lamp, a liquid cylinder, and hollow piston rod operating in said liquid cylinder and means whereby the hollow piston rod is automatically raised by the counterbalance weight of the lamp, substantially as described.”

“(1) It is first said that the device in question is a *unitary* thing all parts of which are called for by the claim; that the claim is to a combination which is an entirety; and that the defendant’s device was the same combination and the same entirety; and hence that all the profits flowed from the infringement all must be paid over. Leaving out of view for the moment the effect of the presence in the defendant’s machine of the additions or improvements covered by the Wagenhorst patent, there is plausibility in this contention, and it finds apparent support in our decision in *Yesbera v. Hardesty*, 166 Fed. 120; but we do not construe that decision as intended to reach a case like the present. It is true that the patent there was for a combination, the elements of which, perhaps with one exception, were old; *but the essential point of that case is that the combination, as an entirety, was a new thing* and created a new demand *rather than being a mere improvement* on or addition to an old thing, making merely an increased or a different demand. The thing really invented was the complete folding seat, and it was rightly held that profits should be considered with reference to that new thing and not with reference to its old elements. *In the present case*, the terms of the claim furnish analogy to *Yesbera v. Hardesty*, but the similarity goes no farther. Generally, similar printing devices

were old. Nothing was new, except the means governing the descent of the lamp. Except for the artificial rule of the Patent Office which requires a claim to include a completely operative combination (and very likely, in spite of that rule), this invention could properly and accurately have been formulated and claimed as 'an improved lamp-controlling means for a printing apparatus, consisting of, etc.' *In determining the liability for profits, as well as in determining validity and scope, we must give due regard to the real invention—the real contribution or step in advance which the patentee has made—and the due effect of this consideration should not be obscured by the language in which the claim is clothed.* We pointed this out in *Dunn v. Standard*, 204 Fed. 617, 619; 123 C. C. A. 111, 113, saying:

“The question of profits can hardly depend on the largely fortuitous language of the claim in extending the combination, instead of on the actual advance in the art.”

“And it is made additionally clear by the discussion in *Seeger Co. v. American Co.* (D. C.) 212 Fed. 742, 748, 749. We, therefore, conclude that, for the purpose of awarding profits, defendant's structure is not to be treated as merely and only an embodiment of plaintiff's invention; *and it follows that an apportionment of the profits derived from the sale of that structure is prima facie necessary.*”

The principle has been acknowledged and restated by all the text writers.

In 3 Rob. on Patents, pp. 347, 348, in speaking of compensation to be allowed the infringer, says:

“It must also be confined to the benefits which flow from the use of plaintiff’s invention, as distinguished from every other instrument or operation which the defendant has employed in the manufacture of its products. Thus where the plaintiff’s invention is a mere improvement upon an existing process or machine, the advantage derived from the improvement must be separated from that accruing from the original, and only the value of the former advantage be considered.”

In Macomber’s Fixed Law of Patents, Sec. 298, p. 275, it is said:

“If the measure of damage be the same whether a patent be for an entire machine, or for some improvement in some part of it, then it follows that each one who has patented an improvement in any portion of a machine may recover the whole profits arising from the skill, labor or material and capital employed in making the whole machine, and the unfortunate mechanic may be compelled to pay treble his profits to each of a dozen or more several inventors of some small improvement in the machine he has built.”

In *Elgin Wind Power & Pump Co. v. Nichols, et al.*, 105 Fed. 780, 783 (C. C. A. 7th Cir.) it was held that:

“In a suit for infringement of a patent for an improvement only, in a windmill, it is error to assume that the entire profits from the sale of a windmill con-

taining the improvement are due to the presence of the improvement, and in order to recover any profits the burden is upon the complainant to prove what portion of the profits is due to the improvement."

In *Brickill v. Mayor of City of New York*, 112 Fed. 65, 71 (C. C. A. 2nd Cir.) it was held that:

"Where an apparatus for heating water in the boiler of a fire engine is patentable only because of the novelty of a tank and connections therewith to the heater forming a part of the combination or apparatus, the estimation of profits should be based on the relative expense or gain of using the patented apparatus and similar apparatus without the tank and tank connections."

In *Penfield et al. v. C. & A. Potts & Co.*, 126 Fed. 475, 485 (C. C. A. 6th Cir.), the court held that:

"The complainant must in every case give evidence tending to separate or apportion the defendant's profits and complainant's damages between the patented features and the unpatented features, and such evidence must be reliable and tangible, not conjectural or speculative, or he must show by equally reliable or satisfactory evidence, that the profits and damages are to be calculated on the whole machine, for the reason that the entire value of the whole machine, as a marketable article, is properly and legally attributable to the patented feature."

In *Kansas City Hay Press Co. v. Devol et al.* 127 Fed. 363, 365, it was held that:

“Where defendants use complainant’s patented *improvement in connection with other parts of a machine which are free to all*, defendants are not liable for the *entire profits* derived from the use of such machines, because of their failure to keep separate the profits derived from the use of complainant’s improved device, and unless the complainant apportions his damages and the defendants’ profits between the patented and the unpatented features, or shows that the marketable value of the machine is due to the patented feature or shows an established license fee for the use of the patented feature, or establishes by satisfactory evidence the actual damage to his business by reason of the defendants’ competition, he can recover only nominal damages and profits.”

In *Baker v. Crane Co.*; *Crane Co. v. Baker*, 138 Fed. 60, 61 (C. C. A. 7th Cir.), it was held:

“On an accounting for profits and damages for infringement, where the device infringed is an improvement of an existing device, made and sold by defendant, it is necessary for complainant to show what proportion of the profit made on each infringing device sold was due to his improvement.”

It was held by the Circuit Court of Appeals in this Circuit in *Fullerton Walnut Growers’ Association v. Anderson-Barngrover Mfg. Co.*, 166 Fed. 443 that:

“The advantage which a defendant derived from using complainant’s patented invention over what he could derive from any other process or thing which was known prior to that invention constitutes the profits which the complainant is entitled to recover, where the

amount can be ascertained with a reasonable degree of certainty.”

In *Brown v. Lanyon Zinc Co.*, 179 Fed. 309, 312 (C. C. A. 8th Cir.), it was stated by the court that:

“In an accounting for profits received by an infringer, where the infringement is not of an entire machine but only of an improved feature thereof, the recovery must be restricted to such portion of the profits derived from the entire machine as arose from the patented feature.”

In *American Street Flushing Mach. Co. v. St. Louis Street Flushing Mach. Co. et al.*, 192 Fed. 121, 122 (C. C. A. 8th Cir.), it was held:

“In an accounting for profits made by an infringer of a patented device, which as used constituted but a small part of a large completed structure, the complainant has the burden of proof to show the profits realized by defendant and ascribable to such particular device.”

In *Garretson v. Clark*, 111 U. S. 120, 121, the court said:

“Where a patent is for an improvement and not for an entirely new machine or contrivance, the patentee must show in what particular he has added to the usefulness of the machine or contrivance. He must separate its results distinctly from those of the other parts so that the benefits derived from it may be distinctly seen and appreciated.”

But, the appellee argued in the Court below, if the rule laid down by the U. S. Supreme Court in the case

Dowagiac Mfg. Co. v. Minn. Moline Plow Co. (235 U. S. 64), is to be applied to the case at bar, then appellants must first show that they *had a right to use* that part of the device in question not covered by the Brown patent; in short, had the right to use *the Reid device*. The mere statement of this proposition seems to make it absurd. Why should Brown have a greater right in the Reid patented device than the general public has? The question, however, even lacks novelty, for it has been previously raised and decisively answered.

In the case of McCreary v. Penn. Canal Co., 141 U. S. 459, 465. Applying the rule there announced to the facts of the case at bar, the answer is:

“The question here is not whether the (appellant) had in fact the right to use this (prior Reid patented device), but whether so far as this particular case is concerned, it had not that right. *To hold that (appellant) had not, is to assume that (appellee) owned the earlier (Reid) patent, that it was valid, and that (appellants) had infringed it * * *. But these were issues which could only be determined upon a bill framed for that purpose, and could not be made the subject of contest in a collateral proceeding.*” That is, not in assessing damages arising on infringement.

It is also to be noted that the question as to what is open to the public as considered in the latter case involved further the decision as to what profits a mere improver of a pre-existing device is entitled to recover.

(C)
Another question raised on appellants' exception I (d) (Trans. 89) to the Master's report, was the re-

fusal of the Master to permit the appellants to show their apparent liability under a prior patent. See also proceedings set forth in the record (Trans. 51, 57) covered by petition of defendants for leave to file a supplemental answer, and the proposed supplemental answer.

This question may become important if this case should be sent back to the Master. By refusing to take into account appellants' apparent liability under another, prior patent, appellants *became exposed to a double liability* on the same device. *It wrongfully compelled appellant to pay under the Brown patent the tribute due to a prior patent*, if embodied in the same device for which appellants are to account.

"The liability of an infringer under another patent may be shown, and indeed must be shown if to be taken into account in determining such liability. *Elizabeth v. Paving Co.*, 97 U. S. 126, 141. *Herman v. Youngstown Car Mfg. Co.*, 216 Fed. 604, 609.

In *Cann Bros. v. Mich. Iron Co.*, 152 Fed. 178, 182, the court said: Where the question arises whether the infringer is not also liable in connection with the device under another patent "in some other person, *the reasons for the rule requiring a distinguishing of profits becomes clearer because of the necessity of preventing a double liability on the part of defendant.*"

RESUME.

The prior Reid patent disclosed the towel-stringing chain, the basic idea of the device used by appellants, and which Brown himself copied. The Brown improve-

ment is a small advance, if any, in the art, and the claims require narrow construction. (Opinion of trial judge, Trans. 45.)

The customers did not demand any particular towel rack. They were interested only in clean towels. (Trans. 77, 78.)

Neither party made any charge to its customers for the towel rack. The savings from loss of appellants, due to using their towel rack, were due exclusively to the use of the primary Reid idea. The public did not demand a towel rack embodying the Brown improvement. (Trans. 77.) *There was complete absence of proof that the Brown improvement had any tangible value.*

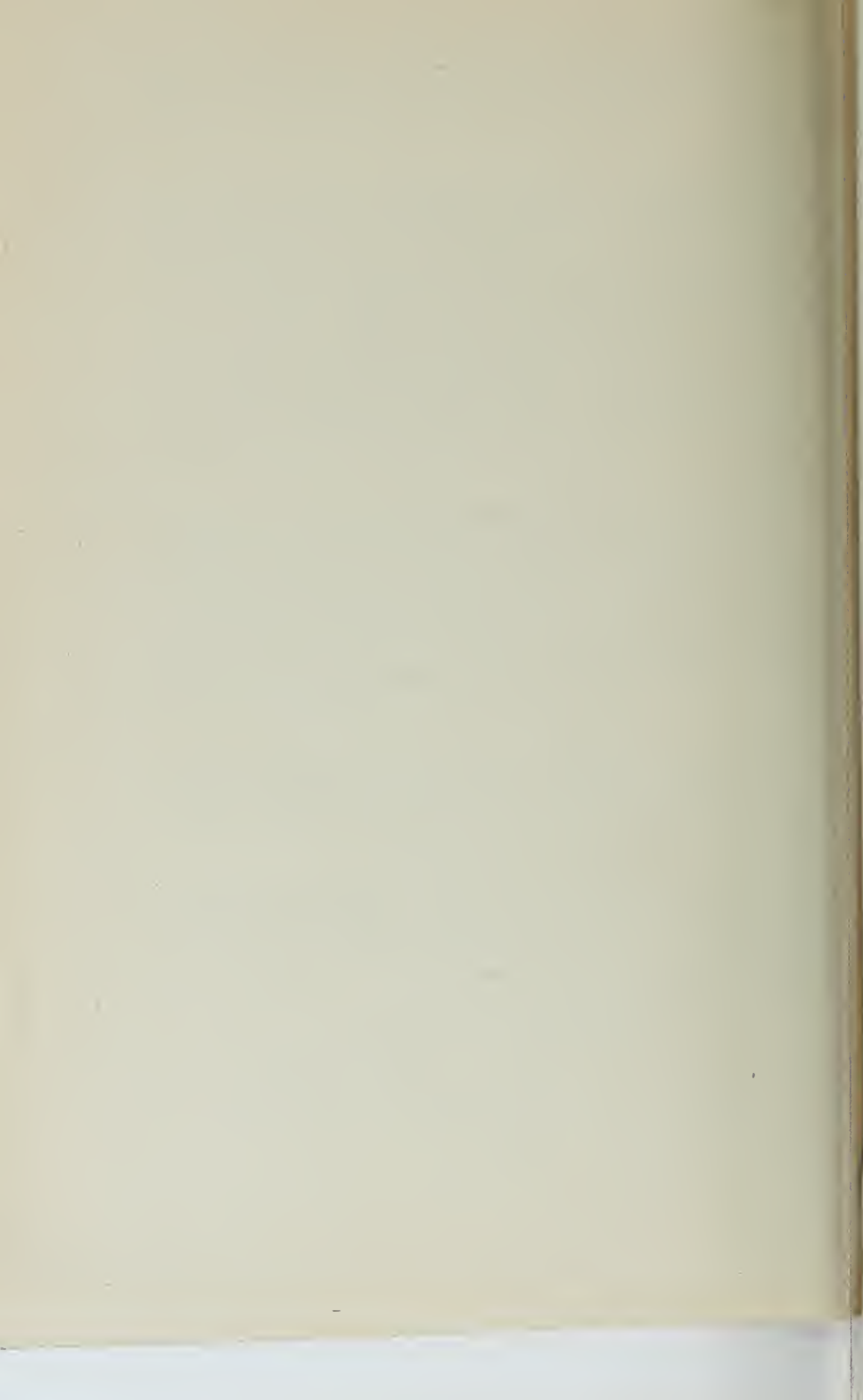
Therefore appellee should only have been awarded nominal damages, and then only for the brief period prior to December 1, 1914, when appellants purposely changed their device so as to in no way produce the function, and alleged new result, specified in the Brown patent.

Therefore, appellants submit that the proceedings of the court below were in error in all the matters specified, and were inequitable and unjust.

The decree should be reversed, with such instructions to the lower court as may be required to govern its further proceedings in this cause.

Respectfully submitted,

T. J. GEISLER,
Of Counsel for Appellants.



Patent

to

W. F. HOYT

Dated Feb. 10, 1891 No. 446,230

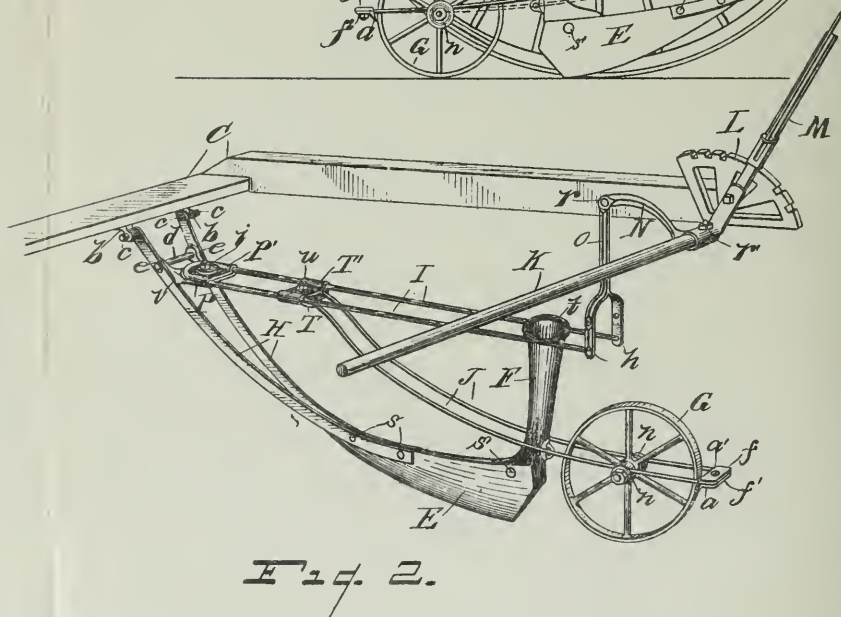
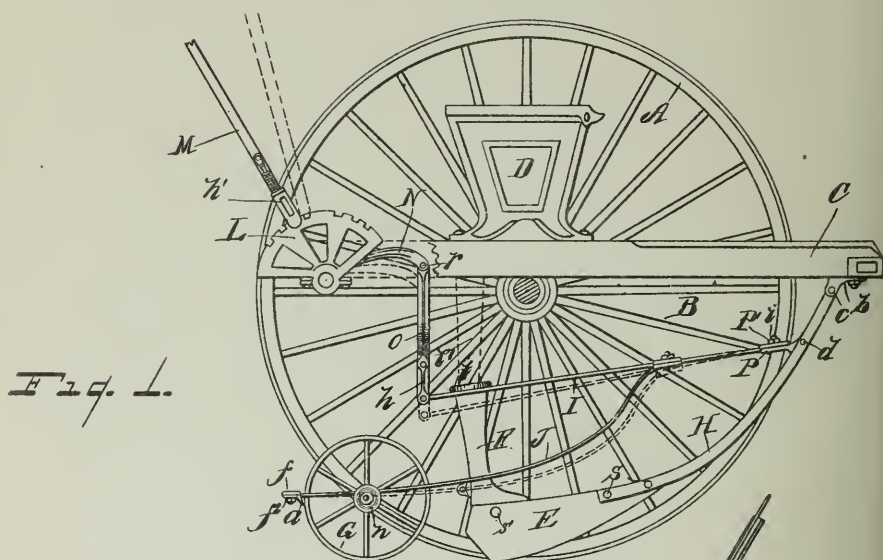
(No Model.)

2 Sheets—Sheet 1.

W. F. HOYT.
GRAIN DRILL.

No. 446,230.

Patented Feb. 10, 1891.



WITNESSES

D. Wheeler
E. Wheeler

INVENTOR

W. F. Hoyt.
By
R. B. Wheeler
Attorney.

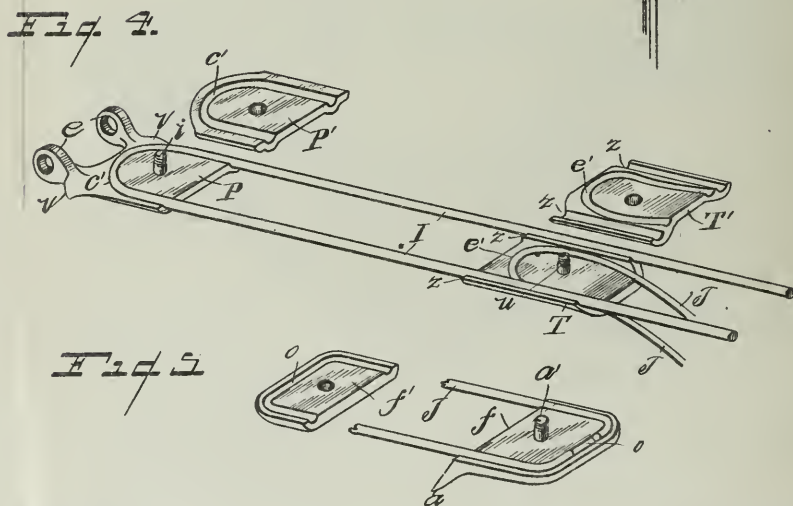
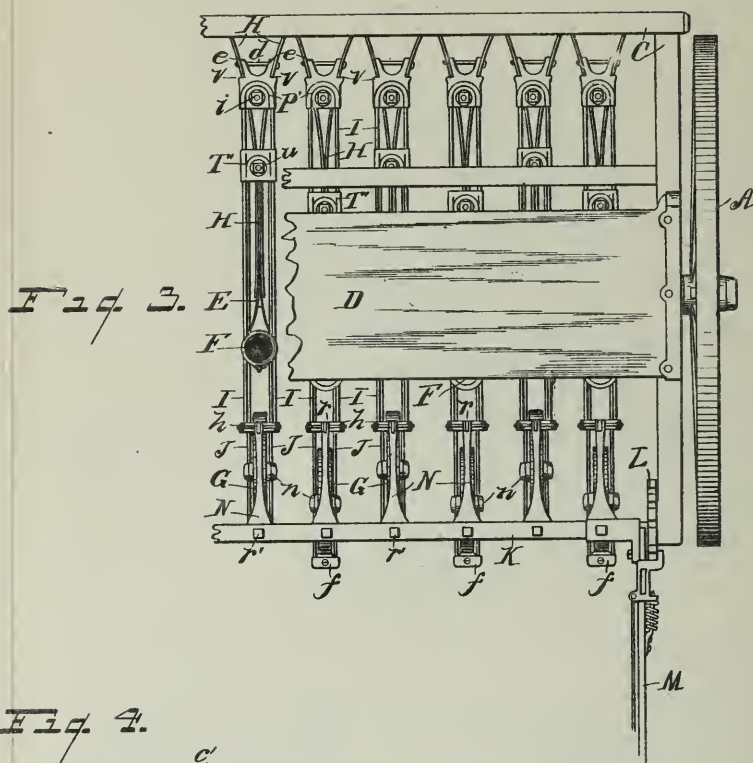
(No Model.)

2 Sheets—Sheet 2.

W. F. HOYT.
GRAIN DRILL.

No. 446,230.

Patented Feb. 10, 1891.



WITNESSES

B. Wheeler
E. Wheeler

INVENTOR

W. F. Hoyt.
Ramon B. Wheeler.
Attorney.

UNITED STATES PATENT OFFICE.

WILL F. HOYT, OF DOWAGIAC, MICHIGAN.

GRAIN-DRILL.

SPECIFICATION forming part of Letters Patent No. 446,230, dated February 10, 1891.

Application filed October 16, 1890. Serial No. 368,348. (No model.)

To all whom it may concern:

Be it known that I, WILL F. HOYT, a citizen of the United States, residing at Dowagiac, in the county of Cass and State of Michigan, have invented certain new and useful Improvements in Grain-Drills; and I do declare the following to be a full, clear, and exact description of the invention, such as will enable others skilled in the art to which it appertains to make and use the same, reference being had to the accompanying drawings, and to the letters of reference marked thereon, which form a part of this specification.

This invention relates to new and useful improvements in grain-drills commonly known as "shoe-drills;" and it consists in a certain construction and arrangement of parts, as hereinafter more fully set forth, the essential features of which being pointed out particularly in the claims.

The object of the invention is to provide an independent spring-pressure for each of the shoes and covering-wheels of the drill, whereby the work of the drill is rendered efficient in uneven ground, and to provide means whereby said shoes and covering-wheels may be raised from the ground when the implement is not in use or when transporting it from one field to another. This object is attained by the mechanism illustrated in the accompanying drawings, in which—

Figure 1 is an end elevation of my improved drill with one of the transporting-wheels removed, showing frame broken away. Fig. 2 is a perspective view of a portion of the drill embodying my improved features. Fig. 3 is a plan view of a portion of the machine. Fig. 4 is an enlarged perspective of the clamping-plates detached, between which the spring pressure-rods of the shoe and covering-wheel are adapted to be secured. Fig. 5 is a perspective view of the scraper plate and cap, adapted to be secured to the rear ends of the spring-pressure rods of the covering-wheels.

Referring to the letters of reference, A indicates the transporting-wheels of the drill; B, the axle connecting said wheels; C, the frame of the drill, and D the seed-box thereof, all of which parts are common.

E indicates the runners or shoes of the drill, to the forward end of which are riveted, as shown at *s* in Figs. 1 and 2, the curved draft-

rods H. Said rods curve upwardly and are slightly diverging, their upper ends being pivotally mounted on the trunnions *c* of the plates *b*, secured to the under face of the front edge of the frame C, as clearly shown in Figs. 1 and 2.

F indicates the feed tube or hopper, secured at its lower end to the heel of the shoe E, as shown at *s'*, and through which the grain is conveyed to the furrow in the ground formed by said shoe.

I indicates the spring pressure-rods of the shoe. Said rods are formed of one piece bent to a loop at their forward ends, as shown in Fig. 4, and extending rearwardly on each side of the hopper-F. The rear ends thereof are pivotally attached to the bifurcated end *h* of the arm O, as shown in Fig. 2, the upper end of said arm being pivoted at *r* to the free or outer end of the swinging arm N, the opposite end of the arm N being permanently secured at *r'* to the rock-shaft K, which extends along the rear edge of the machine-frame, and which is actuated by the lever M, attached thereto. The forward looped end of the rods I is secured between the clamping-plates P P', which are provided with the grooves *c'* (see Fig. 4) in their adjacent faces, that receive said rods, and in which they are firmly held by the bolt *i*, passing through said plates, which draws them tightly together upon said rods. The under plate P of said clamping-plates is provided with the lugs *e*, having eyes therein that are adapted to receive the bolt *d*, which passes loosely therethrough. The ends of said bolt pass through the adjacent faces of the draft-rods H, and are firmly secured therein, as shown in Figs. 2 and 3, by which means the forward ends of the pressure-rods I are pivotally coupled to the draft-rods. The lugs *e* of the plate P, extending between the draft-rods H, keep the upper ends of said rods spread and in contact with the trunnions *c* of the supporting-plates *b*. The plate P is also provided with the horizontal shoulders *v* on each side thereof, that are adapted to engage the upper edge of the rods H, for purposes hereinafter described.

J indicates the draft and spring pressure-rods of the covering-wheels G, which curve upwardly at their forward ends and are secured between the plates T T', mounted on

the rods II, as shown in Fig. 2. The adjacent faces of the plates T T' are provided with the grooves e' and z . (See Fig. 4.) The grooves e' receive the looped end of the rods J and the grooves z receive the parallel rods I. Said plates are provided with the bolt u , passing therethrough, by means of which they may be securely clamped upon said rods, as shown in Fig. 2, thus firmly securing the plates T T' to the rods I, and the looped end of the rods J between said plates. The rods J extend rearwardly on each side of the hopper F, and pass through and are secured in the hub n of the covering-wheel G. By this means said wheel is guided so as to travel directly in the furrow made by the shoe E in which the seed is deposited. The rods J extend slightly rearward of the wheel G, and are secured between the plates $f f'$, that are provided with the grooves o in their adjacent faces, that receive the bent ends of said rods, as clearly shown in Fig. 5, said plates being clamped upon said rods by means of the bolt a' passing therethrough.

The under plate f is provided with a depending lip a , and the parts are so arranged that said lip acts as a scraper to free the periphery of the wheel G from dirt during the operation of the machine, as shown in Figs. 1 and 2.

The shoes and hoppers, with their draft-rods and covering-wheels, and the spring pressure-rods and their actuating-arm O and swinging arm N, attached to the rock-shaft K, are arranged consecutively throughout the machine, as shown in Fig. 3, and are adapted to be operated simultaneously by means of the lever M, attached to the shaft K, the grain being conveyed to the hopper F of the shoe from the seed-box D by means of a flexible hose l' . (Shown by dotted lines in Fig. 1.) It will now be apparent that by throwing the lever M forward the shaft K is rotated, carrying the outer end of the swinging arm N downward, which, being coupled to the arm O, forces said arm down and depresses the rear ends of the spring-rods I, coupled to the bifurcated end h thereof, the shoulders v of the plate P, to which the forward ends of the rods I are attached, bearing upon the edge of the rods II. As the rear ends of the rods I are depressed the pressure thereon is conveyed through the rods I to the shoe E. At the same time the rods I are depressed by the action above described, the forward ends of the rods J are carried down, throwing an increased pressure on the wheel G, which position of the pressure-rods, lever M, and arm N, is clearly shown by dotted lines in Fig. 1. By this arrangement it is evident that the pressure on the shoe and covering-wheel is a spring-pressure, and may be regulated as desired, enabling a heavy pressure to be applied when the ground is hard or a light pressure when it is soft and yielding.

The arrangement of transmitting the pressure applied to the rods I to the shoe E through

the medium of the shoulders v of the plate P, bearing upon the draft-rods II of said shoe, enables the shoe to drop into a depression in the surface in advance of the covering wheel G, and prevents said wheel from raising the shoe from the ground when riding over an obstruction, thereby insuring a continuous furrow, which would not be the case were the connection rigid between the rods I and II.

When it is desired to raise the shoes and covering-wheels in transporting the machine from one field to another, the lever M is thrown to the rear, rotating the shaft K and raising the swinging arm N, thereby drawing upward on the arm O and raising the rods I, which engage with the annular flange t at the upper end of the hopper F, raising said hopper and shoe, as shown in Fig. 2. The rods J of the covering-wheel G being secured to the rods I, said wheel is also raised by the same operation. Thus it will be seen that by throwing the lever M to the rear the shoes and covering-wheels are simultaneously raised from the ground, and by means of the segment-rack l , that receives the locking-bolt h' of the lever M, said lever may be secured in any desired position. It will also be seen that the manner of mounting the plates T T' upon the rods I permits of their longitudinal adjustment thereon, and the forward ends of the rods J of the covering-wheel G being secured between said plates, the distance between said wheel and the heel of the shoe may be increased or decreased by said adjustment, and that by sliding said plates rearwardly upon the rods I the forward movement of the lever M will throw a still greater pressure upon the wheel G.

Having thus fully set forth my invention, what I claim as new, and desire to secure by Letters Patent, is—

1. In combination with the transporting-wheels and frame, the hopper, shoe, and draft-rods, the latter having a pivotal connection with the frame, the clamping-plates having a pivotal connection with the draft-rods, the spring-metal pressure-rods attached to said plates, said rods extending rearwardly of the hopper, the forked arm coupled to said rods, and means for raising and lowering said arm, substantially as specified.

2. In combination with a frame of a grain-drill, the hopper having a flange at the upper end, the shoe attached to the hopper, the curved draft-rods leading from the shoe and having a pivotal connection with the frame of the machine, a swinging head located between the upper ends of the draft-rods, spring-metal rods attached to the swinging head, said rods extending back of the hopper and below the flange thereof, said spring-metal rods being coupled to an arm, said arm having means for raising and lowering it, and means for locking the parts, for the purposes set forth.

3. In combination with the frame, hopper, shoe, and draft-rods, the plates pivotally at-

tached between the upper portions of said draft-rods, said plates having the horizontal shoulders, said shoulders bearing upon the draft-rods, the spring-metal rods attached to
 5 said plates and passing rearward of and on opposite faces of the hopper, and means for applying pressure to the rear ends of said spring-metal rods, for the purpose specified.

4. In a grain-drill, the combination of the
 10 wheels and main frame, of a hopper, shoe, and draft-rods having a pivotal connection with the frame, means for applying spring-pressure to the shoe, comprising the pressure-rods having their forward ends coupled to
 15 the draft-rods and a lever at the rear ends, a wheel traveling in the path of the shoe, and spring-metal rods coupling said wheel and its journal-bearing with the spring-pressure rods, substantially as indicated.

20 5. In a seed-drill having a hopper, shoe, and draft-rods, the hopper having a projection on its periphery at the top, plates pivoted between the upper end portions of the

draft-rods, spring-metal rods clamped between said plates, means for raising and lowering
 25 the rear ends of said rods, and a wheel traveling in the rear of the shoe, said wheel having a spring-pressure connection with the spring-metal rods leading from the draft-rods.

6. In combination with the hopper, shoe,
 30 and draft-rods, the plates pivoted between the draft-rods, the spring I, clamped between said plates and extending rearward of the hopper, means for raising and lowering the rear ends of said spring, the wheel in the rear
 35 of the shoe, the plates T T', mounted on the spring I, and the doubled spring-metal rod J having one end clamped between the plates T T' and having on the opposite ends the scraper-plates f f', for the purposes specified
 40

In testimony whereof I affix my signature in presence of two witnesses.

WILL F. HOYT.

Witnesses:

C. A. PATTISON;
 A. VANUXEM.

